

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

January 17, 2012

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-11-2028; TCEQ Docket No. 2010-1087-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality v.
Edward Ratliff, Respondent

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **February 6, 2012**. Any replies to exceptions or briefs must be filed in the same manner no later than **February 16, 2012**.

This matter has been designated **TCEQ Docket No. 2010-1087-PST-E; SOAH Docket No. 582-11-2028**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Thomas H. Walston".

Thomas H. Walston
Administrative Law Judge

THW:nl
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: EDWARD RATLIFF
SOAH DOCKET NUMBER: 582-11-2028
REFERRING AGENCY CASE: 2010-1087-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ THOMAS H. WALSTON**

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EDWARD MICHAEL RATLIFF, J.D.

**SOAH DOCKET NO. 582-11-2028
TCEQ DOCKET NO. 2010-1087-PST-E**

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner**

V.

**EDWARD RATLIFF,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) brought this enforcement action against Respondent Edward Michael Ratliff, alleging that Mr. Ratliff violated 30 Tex. Admin. Code (TAC) § 334.47(a)(2) by failing to permanently remove from service six inactive petroleum underground storage tanks (USTs) located in Bowie, Montague County, Texas. Mr. Ratliff asserted several defenses, including: (1) under Tex. Water Code (Water Code) § 26.344(a)(5), the USTs were exempt from regulation as part of a storm water collection system; (2) the USTs have been physically removed from the site; and (3) the Commission waived its authority to bring this action by its long delay and by failing to pursue an enforcement action against the prior owner.

Based on the evidence presented, the Administrative Law Judge (ALJ) finds: (1) the USTs were not exempt from regulation, because they previously contained a regulated petroleum substance and Mr. Ratliff's change in service to water storage was not completed in accordance with the Commission's rules; (2) although Mr. Ratliff removed the USTs from his property during the course of this enforcement proceeding, the removal was not completed in compliance with the Commission's rules because no site assessment was performed; and (3) the Commission did not waive its rights to pursue this enforcement action. Therefore, the ALJ concludes that the ED proved the violation alleged against Respondent and recommends that the Commission assess an administrative penalty of \$2,625 and require Mr. Ratliff to take corrective action of completing the permanent removal from service of the UST system in accordance with 30 TAC § 334.55.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to Water Code § 5.013 and Chs. 7 and 26. The State Office of Administrative hearings (SOAH) has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Water Code § 26.021 and Tex. Gov't Code Ch. 2003.

On October 25, 2010, the ED issued and served on Mr. Ratliff a Preliminary Report and Petition (EDPRP). The EDPRP provided a short, plain statement of facts and informed Mr. Ratliff of the charges against him, including a reference to the relevant statutory and regulatory provisions. On January 24, 2011, the Commission issued a Notice of Public Hearing, which scheduled a preliminary hearing concerning the EDPRP on February 24, 2011. At Mr. Ratliff's request, the preliminary hearing was rescheduled to March 24, 2011. Thereafter, a procedural schedule was established that led to a hearing on the merits on November 18, 2011.

The hearing on the merits convened as scheduled on November 18, 2011, before ALJ Thomas H. Walston at SOAH's hearing facilities in Austin, Texas. Staff attorney Steven Fishburn represented the ED. Respondent appeared by telephone and represented himself. The record closed the same day.

II. APPLICABLE LAW

- Water Code § 7.051 authorizes the Commission to assess administrative penalties against a person who violated the Water Code or a rule adopted by the Commission.
- Water Code § 7.073 authorizes the Commission to order a person who violated the Water Code or a rule adopted by the Commission to take corrective action.
- Water Code § 26.011 confers all necessary or convenient powers on the Commission to carry out its responsibilities under Water Code Ch. 26, which governs, among other things, USTs.

- Water Code § 26.345 empowers the Commission to develop a regulatory program, including the adoption of rules necessary to carry out the purposes of Water Code Ch. 26.
- Water Code § 26.344(a)(5) and 30 TAC § 334.3(a)(5) exempt from regulation under Water Code Ch. 26 and 30 TAC Ch. 334 an underground tank that is a storm water or wastewater collection system.
- 30 TAC § 334.1(b) provides that a UST system is subject to the Commission's regulations when it has contained a regulated substance and is not completely exempted or excluded from regulation.
- 30 TAC § 334.2(50) provides that a UST is "in service" from the time regulated substances are first placed into the tank and continuing until the tank is permanently removed from service by either removal from the ground, abandonment in-place, or change-in-service.
- 30 TAC § 334.2(59), (81), and (91) define "regulated substance" as including gasoline and diesel fuel.
- 30 TAC § 334.3(c) requires an owner of an underground tank claimed to be exempt from regulation to provide documentation and other information to support that claim.
- 30 TAC § 334.43(b) provides that the Commission may grant a variance only if the proposed alternative will result in a UST system that is no less protective of human health and safety and the environment than the requirement for which a variance is sought.
- 30 TAC § 334.46(b)(1) establishes an upgrade requirement that all underground metallic components of an existing UST system shall be equipped with a cathodic corrosion protection system.
- 30 TAC § 334.47(a)(2) requires permanent removal from service of an existing UST system (one installed prior to December 22, 1988) that has not been brought into timely compliance with specified upgrade requirements.
- 30 TAC § 334.2(75) defines permanent removal from service as the termination of the use and the operational life of a UST by means of either removal from the ground, abandonment in-place, or change-in-service.
- In order to permanently remove from service a UST system (including removal from the ground, abandonment-in-place, or a change-in-service from storing a regulated substance

to storing a non-regulated substance), 30 TAC § 334.55(a)(6), (b), (c), and (d) require a determination whether any release of a regulated substance has occurred. Above-ground releases shall be determined by visual inspection; below-ground releases shall be determined by a comprehensive site assessment performed in accordance with the Commission's rules.

- 30 TAC § 334.55(e) provides the procedures for a comprehensive site assessment. It requires, among other things, that the site assessment be performed by qualified personnel under the supervision of a person licensed or registered with the Commission as a UST installer, on-site supervisor, or corrective action project manager.

III. DISCUSSION

A. Background

The six USTs in question were located at a closed convenience store/gas station, known as Mac's Grocery, located at 3721 North SH 59, Bowie, Texas.¹ The USTs were designated as:

T-1: 1,000 gallons,
T-2: 2,000 gallons,
T-3: 5,000 gallons,
T-4: 6,000 gallons,
T-5: 4,000 gallons, and
T-6: 1,000 gallons.

According to the Commission's records, five of the tanks were installed January 1, 1979, and T-4 was installed January 1, 1981. All six tanks were single-wall steel construction, and all were temporarily removed from service November 5, 2001.² When they were in service, tanks T-5 and T-6 contained diesel fuel and the remaining tanks contained gasoline.³

¹ The address was previously listed as 3115 SH 59 N, but at some point the address was changed for purposes of 911 emergency services.

² Ex. ED-3.

³ Ex. ED-5 at 28-29.

Commission Staff previously investigated the facility in September 2001 when it was owned by other persons. The facility was closed at that time, and the tanks were empty and were temporarily removed from service. However, the UST system lacked corrosion protection. On October 9, 2001, the Air/Waste Section Manager of the TCEQ Abilene Region Office sent a letter to the then-owner of the facility, informing her that the UST system was not properly protected and monitored and that her options were either to permanently remove the USTs from service or to request a variance to return the UST system to operation.⁴ In a memorandum to the file dated December 3, 2001, the Commission investigator and the Air/Waste Section Manager noted that the prior owner had amended her registration to register the USTs as out-of-service, but the facility remained out of compliance for failure to permanently remove the UST system from service. Nevertheless, the memo stated: "No further action required at this time regarding this facility."⁵

Mr. Ratliff purchased the Mac's Grocery property from the estate of the prior owner on April 24, 2009.⁶

B. Inspection / Investigation

On September 18, 2009, Ms. Patty Gough, a Commission investigator at the Abilene Office, sent Mr. Ratliff a letter informing him that she would inspect the Mac's Grocery facility on September 30, 2009. At the hearing, Ms. Gough explained that the U.S. Environmental Protection Agency (EPA) had begun requiring inspections of UST facilities at least once every three years. Therefore, the Abilene Office started inspecting old closed facilities, and Mac's Grocery was on the list.

Ms. Gough inspected the property on September 30, 2009, as scheduled, but neither Mr. Ratliff nor anyone on his behalf attended the inspection. Ms. Gough observed that the

⁴ Ex ED-5.

⁵ *Id.* at 19.

⁶ Ex. ED-8.

facility was out of service and appeared abandoned. All fill pipes were secured and locked, so she could not confirm the tanks were empty. The dispensers in place were secured from tampering, but two dispensers had been removed and had uncapped piping. There was no evidence of cathodic protection and the facility had no electric service. Ms. Gough did not observe any other deficiencies.⁷

On November 6, 2009, Ms. Gough spoke to Mr. Ratliff by telephone for an exit interview. Ms. Gough requested Mr. Ratliff to provide documents to establish that the USTs were “empty,” as defined by 30 TAC § 334.54(d). She also informed him of the following alleged violations:

- Failure to update the TCEQ UST registration form to show new ownership. 30 TAC § 334.7(d)(3). (This alleged violation was resolved by Mr. Ratliff submitting a new registration form.)
- Failure to permanently remove USTs that did not meet corrosion protection upgrade requirements. 30 TAC § 334.47(a)(2).
- Failure to properly secure USTs against tampering or vandalism. 30 TAC § 334.54(b)(2).
- Failure to have records available for investigation. 30 TAC § 334.10(b)(1)(B).⁸

At the conclusion of the exit interview, Mr. Ratliff requested that he be given 90 days to comply.⁹

On November 25, 2009, Michael Taylor, the Air/Waste Section Manager for the Commission’s Abilene Region Office, sent Mr. Ratliff by certified mail a Notice of Violation (NOV), which repeated the alleged violations noted above. The letter directed Mr. Ratliff to provide a written description of the corrective action he had taken and supporting documentation by February 26, 2010.¹⁰ Mr. Ratliff signed for receipt of the NOV on December 14, 2009.¹¹

⁷ Ex. ED-1.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.* at 6.

¹¹ *Id.* at 11.

Mr. Ratliff sent a written reply to Mr. Taylor on December 15, 2009. In this letter, Mr. Ratliff stated, among other things, that pursuant to Water Code § 26.344, the USTs were exempt from regulation because they were used to capture storm water and grey water to supplement his water supply. Mr. Ratliff also stated that he never operated the facility after he bought it, and the previous owners were deceased and he believed they had disposed of all their records; therefore, he had no records of any kind to provide to Ms. Gough. Mr. Ratliff concluded by requesting Mr. Taylor to remove any reference to him or his property in the Commission's records.¹²

On January 20, 2010, a teleconference was held with Mr. Ratliff, Mr. Taylor, Ms. Gough and other Commission staff. In this meeting, Mr. Ratliff was informed that he could convert the USTs from petroleum storage to storage of non-regulated substances; however, 30 TAC § 334.55 required a site assessment to ensure that no previous petroleum releases had occurred. Mr. Taylor sent Mr. Ratliff copies of the applicable Commission rules, and on February 4, 2010, Mr. Ratliff responded that he was reviewing the materials. On March 8, 2010, Mr. Taylor contacted Mr. Ratliff by e-mail to request a response and to offer an extension of the compliance date to May 24, 2010, which Mr. Ratliff acknowledged on March 15, 2010. Mr. Taylor confirmed this discussion with Mr. Ratliff by letter dated March 31, 2010.¹³

On May 24, 2010, Mr. Ratliff sent a letter to Ms. Gough and Mr. Taylor requesting a waiver of the alleged violations, stating that the USTs at Mac's Grocery posed no threat to the public health. However, he did not provide a plan of action or other required documentation, so Ms. Gough sent him a copy of the applicable rules concerning a change in service and permanent removal of USTs. Another Commission employee also conferred with Mr. Ratliff by telephone on May 25, 2010, to provide a list of contractors and to explain the applicable rules concerning procedures for converting USTs to water storage tanks.¹⁴

¹² Ex. ED-2 at 32-36.

¹³ *Id.* at 1-3, 6, 32-45.

¹⁴ Ex. ED-3 at 3.

Mr. Ratliff contacted Ms. Gough by email on May 28, 2010, regarding resolution of the alleged violations for failing to properly secure the USTs and for failing to have records available for inspection. Ms. Gough met Mr. Ratliff at the facility on June 9, 2010, and conducted an on-site inspection. The inspection confirmed that the USTs were empty, as defined by 30 TAC § 334.54(d), and that the USTs and all pipe endings were secured. Mr. Ratliff also explained that he had no records from the prior owners, and he demonstrated how the UST system was then being used for water storage and irrigation. Although Mr. Ratliff was using the UST system to store water, he had not conducted a site assessment in accordance with 30 TAC § 334.55(e), which is required to officially convert a system that previously stored a regulated substance. Based on this inspection, Ms. Gough concluded that Mr. Ratliff had resolved all alleged violations except for failing to permanently remove USTs that did not meet upgrade requirements, as required by 30 TAC §§ 334.47(a)(2) and 334.55. Therefore, on June 15, 2010, Mr. Taylor mailed Mr. Ratliff a Notice of Enforcement concerning the one remaining alleged violation. This was received by Mr. Ratliff on June 17, 2010.¹⁵

In March 2011, Mr. Ratliff reported to Commission Staff that the USTs had collapsed during an attempt to use the tanks for irrigation. A large sinkhole resulted and Mr. Ratliff removed the tanks without notifying the Commission in advance, because he thought the sinkhole was a safety hazard. On April 27, 2011, Ms. Gough conducted a UST removal investigation at the property, but Mr. Ratliff could not attend. During the inspection, Ms. Gough found that the tanks had been removed and piping was scattered around the site. She did not detect any noticeable odor or visible product. Mr. Ratliff did not use a licensed contractor because he believed water tanks were not subject to regulation. In addition, Mr. Ratliff reported that no site assessment or soil analysis was performed because he did not believe they were necessary for water storage tanks.¹⁶

Ms. Gough conducted an exit interview with Mr. Ratliff by telephone on May 23, 2011. She also mailed Mr. Ratliff a request for records to document that the tanks were properly

¹⁵ *Id.* at 3-14.

¹⁶ Ex. ED-4 at 3.

removed, but she received no such documents from Mr. Ratliff. Therefore, Mr. Taylor notified Mr. Ratliff about various alleged rule violations committed by Mr. Ratliff in removing the tanks.¹⁷ Those alleged violations are not part of this enforcement proceeding.

C. Testimony

Patricia Gough: Ms. Gough testified at the hearing concerning her inspections of the facility, as described above. She noted that some of the alleged violations were resolved, and Mr. Ratliff had removed the tanks from his property. Now, the only remaining issue is that Mr. Ratliff must perform a proper site assessment, as required by 30 TAC §§ 334.47(a)(2) and 334.55(a)(6)(B)(ii).

On cross examination, Ms. Gough acknowledged that she had never investigated this facility before 2009, and that the 2001 violation by the prior owner was not corrected but also did not proceed to an enforcement action. Ms. Gough agreed that Mr. Ratliff corrected some of the alleged violations, and he attempted to convert the UST system into a water storage system. However, she explained that the tanks likely corroded due to a lack of a corrosion protection system, which ultimately resulted in the tanks collapsing. Ms. Gough stated that the Commission had no reports of leaks by this facility, the tanks were empty, and she did not observe any evidence of leaks during her inspections, such as dead vegetation or stained soil. Under these circumstances, Ms. Gough agreed that she was not aware of any actual harm to the public or the environment.

Ms. Gough testified on redirect examination that although the surface did not indicate any leaks, it is important to do a site assessment to determine whether leaks occurred underground, below the tanks and piping. She added that an underground assessment was required because these tanks contained petroleum products and were part of a commercial operation.

¹⁷ *Id.* at 3-25.

Anton Rozsypal: Mr. Rozsypal is a Senior Engineer who has worked for the Commission for 38 years. He works in the area of UST remediation and is involved with evaluating requests for variances and exemptions. Mr. Rozsypal worked with the Abilene Region Office concerning Mr. Ratliff's request for an exemption or variance for the Mac's Grocery UST system. He explained that these tanks are fully regulated by the Commission because they previously contained regulated petroleum substances. He cited a comment by the Commission published in the Texas Register in 1989, when certain rules contained in 30 TAC Ch. 34 were adopted. That comment stated:

One commenter addressed the need for clarification of the applicability of the rules to tanks that had contained regulated substances, but were subsequently cleaned and refilled with unregulated substances. TWC states that if the tanks contained a regulated substance subsequent to January 1, 1974, then the tank is subject to UST regulation and should comply with the change in service requirements of § 334.55(d). . . .¹⁸

Because Mr. Ratliff's USTs contained regulated petroleum products after January 1, 1974, Mr. Rozsypal stated, they remain subject to the Commission's rules even though the tanks were emptied and refilled with water. In other words, the USTs do not qualify for exempt status under Water Code § 26.344(a)(5), as argued by Mr. Ratliff, because the tanks previously contained petroleum substances, and they were never permanently removed from service pursuant to the Commission's rules before Mr. Ratliff used them for water storage.

Mr. Rozsypal also testified that Mr. Ratliff's request for a variance was controlled by 30 TAC § 334.43. Among other things, the rule provides that the Commission may grant a variance only if the owner can demonstrate that the proposed alternative procedure will result in a UST system that is no less protective of human health and the environment than the requirements of the rule for which a variance is sought. In Mr. Rozsypal's opinion, Mr. Ratliff did not propose an alternative to performing the required site assessment that would be as protective of human health and the environment. Therefore, he concluded that Mr. Ratliff was

¹⁸ 14 Tex. Reg. 4714 (Sep. 15, 1989).

not entitled to a variance from the regulatory requirements for a permanent change in service for the USTs.

Mr. Rozsypal added that the lack of odors or surface stains does not establish that no contamination has occurred. Rather, he said, testing underground soils is more important, and this can only be properly determined by a site assessment. Even though the tanks were emptied and removed, he believed that a site assessment is still necessary to determine whether leaks occurred in the past that might need remediation.

On cross-examination, Mr. Rozsypal agreed that the rules should be applied equally to all owners. He was not aware of the enforcement action against the prior owners of Mac's Grocery. He added, however, that the Energy Act of 2005 required more inspections of out-of-service facilities. He stated that the inspection of Mr. Ratliff's property was likely prompted by the new federal law and federal regulations requiring inspection of all facilities at least once every three years. Mr. Rozsypal agreed that these tanks have likely been empty since at least 2001, when the prior notice of violation was issued against the previous owners.

Andrea Park: Ms. Park is an Enforcement Coordinator for the Commission. She explained the calculations on the Penalty Calculation Worksheet for this case. According to Ms. Park, the proposed administrative penalty of \$2,625 is appropriate for the alleged violation. Concerning corrective action, Ms. Park stated that a site assessment is still needed, even though Mr. Ratliff has removed the tanks. She noted that these tanks held up to 19,000 gallons of petroleum products for many years, which could have resulted in underground leaks.

Edward Michael Ratliff: Mr. Ratliff testified that he purchased the Mac's Grocery property in April 2009. He lives near the property and knew the owners, who had died. He checked property records and found no liens or other issues. At some point, Mr. Ratliff removed gas dispensers and made plumbing connections to store water. When contacted by Ms. Gough, he explained his plans for storing water, provided her full access to the property, and tried to cooperate with the Commission. He believed that, by storing water, the tanks were exempt from

regulation by the Commission. Further, because the Commission did not take any action against the prior owners after the 2001 investigation, which concerned the same issues, Mr. Ratliff argued that the Commission has waived its right to pursue a disciplinary action against him.

Mr. Ratliff testified that the water he put in the tanks seemed to destroy the steel. When he had some equipment on the surface above the tanks, they collapsed and created a sinkhole. Therefore, he removed the tanks and cut them up for scrap, and he said the tanks contained no petroleum products. Mr. Ratliff said he hired some men to help him and to remove the scrap metal, but he does not know where they took it.

In short, Mr. Ratliff pointed out that the tanks were emptied of petroleum products many years ago, and the Commission took no action concerning the tanks since 2001, until he started using them for an exempt purpose (storing water). In his view, this is not fair or equal treatment by the Commission.

D. Parties' Arguments

Staff argued that Mr. Ratliff was responsible for the USTs because he owned them. Further, Staff stated that the USTs remained subject to regulation even after Mr. Ratliff used them for water storage, because they previously contained a regulated petroleum substance and the change in service was not completed in accordance with Commission rules. Staff also cited case law which holds that waiver only occurs with an intentional relinquishment of a known right, and the mere passage of time does not constitute waiver by a state agency.¹⁹

Mr. Ratliff argued three points. First, he argued that the Commission waived its right to pursue an enforcement action concerning the USTs, because after the 2001 investigation the Abilene Air/Waste Section Manager decided: "No further action required at this time." The

¹⁹ The cases cited by Staff were: *Waller v. Sanchez*, 618 S.W.2d 407 (Tex. Civ. App. – Corpus Christi 1981, no writ); *Bass & Co. v. Dalsan Properties-Abilene*, 885 S.W.2d 572, 577-78 (Tex. App. – Dallas 1994, no writ); *Buffington v. DeLeon*, 177 S.W.3d 205, 212 (Tex. App. – Houston [1st Dist.] 2005, no pet.); *Cowboy Transport v. Villarreal*, 314 S.W.3d 636 (Tex. App. – Houston 14th Dist. 2010, no writ).

Commission then failed to take any action for many years, until Mr. Ratliff bought the property. Mr. Ratliff also complained that there is no public notice of these types of problems to prospective property buyers.

Second, Mr. Ratliff argued that these storage tanks were exempt from regulation under Water Code § 26.344(a)(5) because he used them for water storage. He stressed that no petroleum products had been in the tanks for many years; there was no indication of a spill on the surface; the Commission had no record of reported leaks or spills; and Mr. Ratliff ultimately removed the tanks.

Finally, Mr. Ratliff argued that the Commission has failed to equally apply the law. When the same circumstances existed with the prior owners, Commission Staff decided that no further action was required, and the matter remained dormant for many years. Yet, when Mr. Ratliff purchased the property, Staff initiated an inspection, investigation, and enforcement proceeding. In Mr. Ratliff's view, he has been treated unfairly and subjected to arbitrary enforcement.

III. ANALYSIS AND RECOMMENDATION

The ALJ finds that Mr. Ratliff violated 30 TAC § 334.47(a)(2) because he did not permanently remove from service, in accordance with the Commission's rules, an existing UST system that had not been brought into compliance with specified upgrade requirements. The ALJ also finds that the Commission did not waive its right to pursue this enforcement action and that the Commission has not subjected Mr. Ratliff to unequal enforcement of the law.

The USTs at Mac's Grocery were previously used to store gasoline and diesel fuel and, thus, became subject to regulation under Water Code Ch. 26 and 30 TAC Ch. 334. For a time, Mr. Ratliff used the USTs for storing water, and he argued that this made the tanks exempt from regulation pursuant to Water Code § 26.344(a)(5). However, these USTs did not qualify for exemption under section 26.344 because Mr. Ratliff did not properly complete a change-in-

service of the system from storing regulated substances to storing water. Among other things, a proper change-in-service requires that the owner determine whether any release of a regulated substance has occurred. Above-ground releases can be determined by visual inspection, but below-ground releases must be determined by a comprehensive site assessment performed in accordance with the Commission's rules.²⁰ Those rules require that a site assessment be performed by qualified personnel under the supervision of a person licensed or registered with the Commission.²¹ The evidence was undisputed that no such site assessment was performed at this facility. Therefore, because a proper change-in-service was not accomplished for this UST system, it remained subject to regulation and was not exempt under Water Code § 26.344(a)(5), even though Mr. Ratliff used the tanks to store water.

Mr. Ratliff also physically removed the tanks from the ground during the course of this enforcement action. He did this with his own equipment and hired labor. Again, however, for permanent removal-from-service of a UST system by removing the tanks from the ground, the Commission's rules require the owner to determine by a comprehensive site assessment whether any below ground release of regulated substances has occurred.²² Because Mr. Ratliff did not have such a site assessment performed, the UST system has not been permanently removed from service in accordance with the Commission's rules, even though the tanks have been physically removed from the ground.

Staff brought this enforcement action based on Mr. Ratliff's alleged violation of 30 TAC § 334.47(a)(2). That rule requires an owner to permanently remove from service an existing UST system that has not been brought into timely compliance with specified upgrade requirements. When Ms. Gough inspected the facility on September 30, 2009, she determined that the UST system did not have cathodic corrosion protection system, which is a specified upgrade requirement under 30 TAC § 334.47(b)(1). And as discussed above, Mr. Ratliff has not

²⁰ 30 TAC § 334.55(a)(6) and (d). The rule also allows determination of below-ground releases by the continual operation of external release monitoring and detection methods operating in accordance with 30 TAC § 334.50(d)(5)-(8). However, the Mac's Grocery facility had no such monitoring and detection methods.

²¹ 30 TAC § 334.55(e).

²² 30 TAC § 334.55(a)(6) and (b).

permanently removed the UST system in accordance with the Commission's rules because no site assessment has been performed. Therefore, Staff has established that Mr. Ratliff violated 30 TAC § 334.47(a)(2), as alleged. Further, the evidence established that the proposed administrative penalty of \$2,625 was properly calculated.

The evidence did not establish that the Commission waived its right to bring this enforcement action, as argued by Mr. Ratliff. Waiver occurs only with an intentional relinquishment of a known right, and the mere passage of time does not constitute waiver by a state agency.²³ To establish waiver, Mr. Ratliff cited an internal memo dated December 3, 2001, by a Field Investigator and the Air/Waste Section Manager at the Commission's Abilene Region Office. That memo concerned a prior investigation at the Mac's Grocery, which determined that the USTs lacked corrosion protection. However, the memo concluded: "No further action is required at this time regarding this facility." This memo did not establish an intentional relinquishment of the Commission's right to pursue an enforcement action in the future. On its face, the memo merely states that no further action was required at that time. The mere statement that no further action was required does not establish the intentional relinquishment of a right. Further, the statement that no further action was required "at this time" does not establish the waiver of the right to take action in the future. In short, the evidence did not establish that the Commission has waived its right to bring this enforcement action.

Likewise, the evidence did not establish that the Commission has subjected Mr. Ratliff to unequal enforcement of the law. To establish discriminatory enforcement against a state agency, a respondent must show that he has been singled out for prosecution while others similarly situated and committing the same acts have not.²⁴ However, it is not sufficient to show only that


²³ *Waller v. Sanchez*, 618 S.W.2d 407 (Tex. Civ. App. – Corpus Christi 1981, no writ); *Bass & Co. v. Dalsan Properties-Abilene*, 885 S.W.2d 572, 577-78 (Tex. App. – Dallas 1994, no writ); *Buffington v. DeLeon*, 177 S.W.3d 205, 212 (Tex. App. – Houston [1st Dist.] 2005, no pet.); *Cowboy Transport v. Villarreal*, 314 S.W.3d 636 (Tex. App. – Houston 14th Dist. 2010, no writ).

²⁴ *Allen-Burch, Inc. v. Texas Alcoholic Beverage Comm'n*, 104 S.W.3d 345, 353 (Tex. App. – Dallas 2003, no pet.).

a law is enforced against some and not others.²⁵ Instead, a respondent must show a clear, intentional discrimination in enforcement.²⁶ Although the Commission did not pursue its enforcement action against the prior owners of Mac's Grocery, Ms. Gough and Mr. Rozsypal explained that after 2005 the EPA required inspections of UST facilities at least once every three years. Therefore, the Abilene Office started inspecting old closed facilities, and Mac's Grocery was on the list. There was no purposeful discrimination against Mr. Ratliff, and the Commission did not deny him equal protection of the law.

In summary, the evidence established that Mr. Ratliff violated 30 TAC § 334.47(a)(2) because he did not permanently remove from service, in accordance with the Commission's rules, an existing UST system that has not been brought into timely compliance with specified upgrade requirements. Specifically, the UST system was not in compliance because it did not have a cathodic corrosion protection system as required by 30 TAC § 334.47(b)(1). The ALJ finds that the Commission did not waive its right to pursue this enforcement action and that the Commission has not subjected Mr. Ratliff to unequal enforcement of the law. As a result, the ALJ recommends that the Commission assess a \$2,625 administrative penalty against Mr. Ratliff and require Mr. Ratliff to perform a comprehensive site assessment in accordance with 30 TAC § 334.55(e) and to complete the permanent removal of the UST system in accordance with the Commission's rules.

SIGNED January 17, 2012.



THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

²⁵ *Id.*

²⁶ *State v. Malone Service Co.*, 829 S.W.2d 763, 766-67 (Tex. 1992); *Combs v. STP Nuclear Operating Co.*, 239 S.W.3d 264, 275-76 (Tex. App. – Austin 2007, pet. denied).

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing an Administrative Penalty Against and
Requiring Corrective Action by Edward Michael Ratliff
TCEQ DOCKET NO. 2010-1087-PST-E
SOAH DOCKET NO. 582-11-2028**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing an administrative penalty against and requiring corrective action from Edward Michael Ratliff. Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on November 18, 2011, in Austin, Texas, and presented the Proposal for Decision.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On April 24, 2009, Edward Michael Ratliff (Respondent) purchased a closed convenience store/gas station known as Mac's Grocery, located at 3721 North SH 59, Bowie, Montague County, Texas (Facility). At the time, the Facility included fuel dispensers and six underground storage tanks (USTs) with a total capacity of 19,000 gallons.
2. Before Respondent purchased the Facility, the USTs contained gasoline and diesel fuel.

3. On September 30, 2009, TCEQ Investigator Patty Gough inspected the facility and determined that Respondent had committed four violations of the TCEQ rules regarding USTs.
4. After discussions with Respondent, Ms. Gough re-inspected the Facility on June 9, 2010, and determined that Respondent had resolved all alleged violations except for failing to permanently remove from service USTs that did not meet upgrade requirements for cathodic corrosion protection.
5. The Facility did not have a cathodic corrosion protection system.
6. On June 15, 2010, TCEQ sent Respondent a Notice of Enforcement concerning the one remaining alleged violation. This was received by Respondent on June 17, 2010.
7. At some point, Respondent began using the USTs for storing water for irrigation. Respondent did not have a comprehensive site assessment performed before he began this change of service with the USTs.
8. In March 2011, Respondent physically removed the USTs from the ground at the Facility. He did this with his own equipment and hired labor. Respondent did not have a comprehensive site assessment performed when he removed the USTs.
9. Respondent has never performed a comprehensive site assessment at the Facility.
10. Commission Staff previously investigated the Facility in September 2001, when it was owned by other persons. At that time, the Facility lacked a cathodic corrosion protection system. Although this deficiency was not corrected, the Commission investigator and the Air/Waste Section Manager determined: "No further action required at this time regarding this facility."
11. The Commission took no action concerning the Facility between 2001 and its inspection by Ms. Gough on September 30, 2009.

12. After 2005, the U.S. Environmental Protection Agency required inspections of UST facilities at least once every three years. Therefore, the Abilene Office started inspecting old closed facilities, and Mac's Grocery was placed on the list.
13. There was no purposeful discrimination against Respondent by the Commission inspecting the Facility and bringing this enforcement action.
14. On October 25, 2010, the Executive Director issued and served on Respondent a Preliminary Report and Petition (EDPRP). The EDPRP provided a short, plain statement of facts and informed Respondent of the charges against him, including a reference to the relevant statutory and regulatory provisions. The EDPRP alleged that Respondent violated 30 Tex. Admin. Code § 334.47(a)(2).
15. Respondent requested a contested case hearing on the allegations in the EDPRP, and on December 30, 2010, the Chief Clerk referred this dispute to SOAH for hearing.
16. A Notice of Preliminary Hearing was issued on January 25, 2011.
17. A preliminary hearing was held on March 24, 2011, before ALJ Thomas H. Walston at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.
18. The evidentiary hearing convened on November 18, 2011, before ALJ Thomas H. Walston at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas. The ED was represented by Staff Attorney Steven Fishburn. Respondent appeared by telephone and represented himself. The record closed that day.
19. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$2,625.
20. An administrative penalty of \$2,625 takes into account the factors contained in Tex. Water Code § 7.053 and the Commission's 2002 Penalty Policy.

II. CONCLUSIONS OF LAW

1. Under Tex. Water Code (Water Code) §§ 7.051 and 7.073, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or who violates a Commission administrative rule, order, or permit, and the Commission may also order the violator to take corrective action.
2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to Water Code § 26.021 and Tex. Gov't Code Ch. 2003.
3. Respondent is subject to the jurisdiction of the Commission in regard to the operation of petroleum storage tanks, including petroleum USTs, pursuant to Water Code § 5.013.
4. Respondent received sufficient notice of the hearing on the alleged violations and the recommended penalties and corrective actions, pursuant to Tex. Gov't Code §§ 2001.051(1) and 2001.052; Water Code § 7.058; and 30 Tex. Admin. Code §§ 1.12, 39.25, 70.104, and 80.6(b)(3).
5. Based on the above Findings of Fact, Respondent has not permanently removed the UST system from service in accordance with 30 Tex. Admin. Code § 334.55.
6. Based on the above Findings of Fact, Respondent violated 30 Tex. Admin. Code § 334.47(a)(2).
7. Respondent's USTs were not exempt from regulation under Water Code § 26.344(a)(5).
8. The Commission did not waive its right to bring this enforcement action.
9. The Commission did not subject Respondent to unequal enforcement of the law.
10. The ED's recommended penalty properly considered the factors required by Water Code § 7.053, including its impact or potential impact on public health and safety, natural

resources and their uses, and other persons; the nature, circumstances, extent, duration, and gravity of the prohibited act; the history and extent of previous violations by the violator; the violator's degree of culpability, good faith, and economic benefit gained through the violation; the amount necessary to deter future violations; and any other matters that justice may require.

11. Based on the above findings of fact, the elements set forth in Water Code §§ 7.052 and 7.053, and the Commission's Penalty Policy, the ED correctly calculated the penalty for the alleged violation at \$2,625.
12. The ED met his burden of proof to show an administrative penalty of \$2,625 is warranted for the violation found and should be assessed against Respondent.
13. The ED met his burden of proof to show that Respondent should take corrective action of permanently removing the UST system in accordance with all of the requirements of 30 Tex. Admin. Code § 334.55.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Respondent is assessed an administrative penalty in the amount of \$2,625 for violating 30 Tex. Admin. Code § 334.47(a)(2). The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or assessing penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Edward Ratliff, TCEQ DOCKET NO. 2010-1087-PST-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 30 days after the effective date of this Order, Respondnet shall permanently remove the UST system from service, in accordance with 30 Tex. Admin Code § 334.55.
3. Within 45 days after the effective date of this Order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision paragraph No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Mr. Mike Taylor, Waste Section Manager
Abilene Regional Office
Texas Commission on Environmental Quality
1977 Industrial Blvd.
Abilene, Texas 79602-7833

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.
6. The effective date of this Order is the date the Order is final, as provided by 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code § 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission